Supreme Court, U.S.
FILED
JUL 24 2007
OFFICE OF THE CLERK

No. 07-101

In The
Supreme Court of the United States

JACQUELINE FINLAYSON-GREEN,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether Section 242B(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. 1525b(c)(3), which provides in pertinent part that an *in absentia* order of removal may be rescinded "upon motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances" is jurisdictional or can be equitably tolled?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, in conflict with the Second, Third, Fourth and Ninth Circuits, held that the 180-day deadline for reopening an *in absentia* order of removal based on exceptional circumstances is mandatory and jurisdictional, and may not be tolled based on petitioner's claim of ineffective assistance of counsel. Certiorari should be granted to resolve the split in the circuits, which undermines the longstanding policy of national uniformity in enforcement of the immigration laws.

OPINIONS OF THE COURTS BELOW

The decision of the court of appeals (App. 1-5) is not published in the Federal Reporter, but can be found at *Finlayson-Green v. U.S. Attorney Gen.*, 06-14947 (11th Cir. April 25, 2007). The *per curiam* order of the Board of Immigration Appeals (App. 15-16) and the decision of the Immigration Judge (App. 17-18) are unreported.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on April 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

Section 240(b)(5) of the Immigration and Nationality Act states in pertinent part:

> (A) In general. – Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)) . . .
>
> (C) Rescission of order. – Such an order may be rescinded only – (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1)) . . .

8 U.S.C. 1229(a)(b)(5)(A); 8 U.S.C. 1229(a)(b)(5)(C)(i)

STATEMENT

Statutory History

In the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 545(a), 104 Stat. 5061, Congress took steps to reduce the frequency with which aliens failed to appear at their scheduled deportation hearings. *See* H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1 at 150 (1990). Congress required the former Immigration and Naturalization Service (INS) to provide aliens in removal proceedings written notice of the nature of the proceeding, the grounds

for the charge of removability, the alien's right to be represented by counsel, and the consequences of failing to appear at the proceeding. 8 U.S.C. 1229(a)(1) and (2). Congress then directed that an alien who fails to appear at his deportation hearing "shall be ordered removed *in absentia* if the INS establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable" 8 U.S.C. 1229(a)(b)(5)(A).

If the alien received the statutorily required notice and was not prevented from appearing due to being held in federal or state custody, then the alien may not seek rescission of the removal order entered in absentia unless the alien moves "within 180-days after the date of the order of removal" to reopen the removal proceeding and "demonstrates that the failure to appear was because of exceptional circumstances (as defined in [8 U.S.C. 1229(e)(1)])." 8 U.S.C. 1229(a)(b)(5)(C)(i). The term "exceptional circumstances" refers to circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. 8 U.S.C. 1229(a)(e)(1). Exceptional circumstances can be demonstrated when counsel has been ineffective, and ineffective assistance of counsel is a well-established basis for granting a motion to reopen in Immigration Court pursuant to the Board of Immigration Appeals' (BIA) holding in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). In fact, the BIA has held that a petitioner does not need to demonstrate prejudice when an attorney's incompetence led to an *in absentia* order. *See Matter of Rivera-Carlos*, 21 I & N Dec. 599 (BIA 1996); *Matter of Grijalva*, 21 I & N Dec. 472 (BIA 1996).

Administrative regulations incorporate the statutory requirements for obtaining reopening of an in absentia removal order in the immigration court. *See* 8 C.F.R. 1003.23(b)(4)(ii). The regulations further provide that an alien may not appeal the entry of an *in absentia* removal order directly to the BIA. 8 C.F.R. 1240.15. Rather, the alien may make an appeal to the BIA if the immigration judge (IJ) denies the alien's motion to reopen the removal proceeding. *See Matter of Guzman*, 22 I & N Dec. 722, 723 (BIA 1999) (en banc) ("Only when an alien has exhausted this avenue of relief [by filing a motion to reopen] may he or she file an appeal with the [BIA].").

In amending the Immigration and Nationality Act (INA), through the Immigration Act of 1990, with respect to the period of time and numerical limitations in which motions to reopen and motions to reconsider may be offered in deportation proceedings, Congress' apparent aim was to eliminate the prior practice under which an alien could ignore a deportation or voluntary departure order, and years later, attempt to reopen the proceedings without any adverse consequences. *See Stone v. INS*, 514 U.S. 386, 400, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995) (noting that the Immigration Act of 1990 "took . . . steps to reduce [the] abuses of successive and frivolous administrative appeals and motions").

The legislative history of this provision indicates, however, that while Congress sought to impose general limits on motions to reopen, these limits were not intended to be inflexible. In explaining these new limitations, the House Conference Committee directed that, "the Attorney General ... shall consider exceptions in the interest of justice." H.R. Conf. Rep. No. 101-955, at 133 (1990). The Committee explicitly mentioned one such exception, for

"asylum claims which arise due to a change in circumstances in the country of the alien's nationality after the initiation of the deportation proceedings." *Id.* The Department of Justice responded to this congressional mandate by issuing rules that, while clearly establishing that only one motion to reopen would be permitted and that it must be filed within 90 days, also offered mechanisms whereby otherwise untimely motions could still be considered when the circumstances so required.

Under the new regulations, the time and numerical limits for motions to reopen do "not apply to a motion to reopen agreed upon by the parties [*i.e.*, the INS and the alien] and jointly filed." 8 C.F.R. 1003.23(b)(4)(iv) (2000). Moreover, an IJ or the BIA are permitted to reopen a proceeding, upon their own motions, at any time. *See* 8 C.F.R. 1003.23(b)(1) (2000) ("An [IJ] may upon his or her own motion at any time . . . reopen . . . any case in which he or she has made a decision. . . ."); 8 C.F.R. 1003.2(a) (2000) ("The [BIA] may at any time reopen . . . on its own motion any case in which it has rendered a decision."). In explaining the exercise of this authority, the BIA has stated that,

> the regulations governing motions . . . give the [BIA] clear authority to reopen and remand cases without regard to other regulatory provisions. . . . It would therefore appear that [the BIA] has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy, and that technical deficiencies alone would not preclude such action.

Matter of Yewondwosen, 21 I & N Dec. 1025 (BIA 1997). The authority of an IJ or BIA to accommodate special cases has

survived a subsequent statutory codification of the limits on motions to reopen that, on its face, admits to no such exceptions, further demonstrating that the Department of Justice, in its application of these limits, does not consider them to be jurisdictional. A few months after the Department of Justice promulgated the final rule limiting motions to reopen, Congress established new "removal" proceedings to replace the former "deportation" or "exclusion" proceedings, and in so doing provided the same limits on the reopening of proceedings. *Cf.* 61 Fed. Reg. 18, 900 (promulgating administrative rule on April 29, 1996) with Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, div. C, Tit. III, 304(a)(3), 100 Stat. 3009-593 (enacting statutory rules on Sept. 30, 1996) (codified at 8 U.S.C. 1229(a)(c)(6)(C)). The statutory provisions follow the administrative rule in limiting an alien to "one motion to reopen proceedings," that "shall be filed within 90 days of the date of the entry of a final administrative order." 8 U.S.C. 1229(a)(c)(6)(A), (C)(i). The administrative regulations continue to provide, nevertheless, for *sua sponte* reopening by an IJ or the BIA, or reopening by agreement of the parties at any time, despite the fact that no such exceptions are found in the more recent statutory provisions. *See* 8 C.F.R. 1003.23(b)(1), (b)(4)(iv); 8 C.F.R. 3.2(a) (2000). Whether in the form of specific limits, or the authority for the Department of Justice to impose such limits, the flexibility with which IJs and the BIA have applied these congressional restrictions on motions to reopen confirms that they are not jurisdictional. *See Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000).

In sum, nothing in the 1990 statute that directed the Department of Justice to limit the timing and number of motions to reopen show that these limitations were intended

to be jurisdictional and therefore not subject to equitable tolling.

B. Factual and Procedural Background

Petitioner is a native and citizen of Jamaica. Petitioner entered the United States on December 31, 1996 and has remained in the United States since that time. On March 11, 1997, Petitioner married a United States citizen who filed a visa petition on her behalf, along with her application for adjustment of status. On September 3, 1999, the INS denied Petitioner's application for adjustment of status for failure to appear at the interview. Petitioner maintains that she and her husband appeared for the interview, but it was not held because her husband did not bring any identification. (App. 8).

On August 25, 1999, Petitioner's husband withdrew the petition with a statement alleging the marriage was not *bona fide*. However, the Petitioner maintains that the marriage was *bona fide* and asserts that she divorced her husband on October 28, 1999 because he was a drug addict. *Id.* On October 8, 1999, the Service commenced proceedings to remove petitioner from the United States. *Id.* After her divorce, petitioner moved from Florida to Arizona and she retained an attorney in Arizona, Dorothea Kraeger, to represent her in her removal proceedings. Petitioner married another United States citizen on May 6, 2000. (App. 8 and App. 10). His visa petition on her behalf was approved on May 10, 2006. They have two United States citizen children. *Id.*

Ms. Kraeger filed a motion to change venue and motion for a telephonic hearing with the immigration court in Miami, Florida which was denied on November

29, 1999. The IJ found that the issues of removability were not resolved. (App. 21). Subsequently, Ms. Kraeger filed a motion to reconsider the denial of change of venue request and a motion for a telephonic hearing, which were both denied on December 14, 1999, based on petitioner's non-admission of the factual allegations against her. (App. 19). On the same date, the IJ determined that petitioner was removable from the United States, and entered an in absentia order of removal to Jamaica. (App. 17-18). Subsequently, Ms. Kraeger failed to file a motion to reopen with the immigration court, and instead filed an appeal of the IJ's in absentia order of removal with the BIA. On April 16, 2003, the Board of Immigration Appeals affirmed the IJ's removal order without opinion. (App. 15-16). In May 2003, Ms. Kraeger filed a Petition for Review with the United States Court of Appeals for the Eleventh Circuit. The Petition was dismissed on September 8, 2003, because Ms. Kraeger failed to file a brief. (App. 14).

Ms. Kraeger was suspended by the Arizona bar on April 23, 2005. (App. 7). Ms. Kraeger was also suspended from practice before the Board of Immigration Appeals. (App. 12-13). Petitioner maintains that Ms. Kraeger's ineffective assistance as counsel resulted in her failure to attend the removal hearing, and her failure to properly appeal the *in absentia* removal order to the Eleventh Circuit Court. (App. 2). In October 2005, Petitioner, through new counsel, filed a Motion to Reopen with the BIA due to the ineffective assistance of Ms. Kraeger, pursuant to the BIA's holding in *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988). The BIA denied petitioner's Motion to Reopen on April 10, 2006, stating that Petitioner failed "to adequately explain why she waited so long to file the pending motion ... or why Franquinha [petitioner's

attorney at that time] could not have assisted Petitioner in filing an earlier motion." (App. 13).

Petitioner submitted a motion to reconsider the decision on May 9, 2006, with an affidavit from the petitioner detailing the timeline of events that led to her Motion to Reopen ultimately being filed in October 2005. Petitioner requested that the Board reopen the case *sua sponte* under 8 C.F.R. 1003.2(a) because the Motion to Reopen was filed outside the 180-day time limit, or that the BIA recognize the doctrine of equitable tolling in her case.

The Board denied petitioner's motion to reconsider on August 15, 2006, stating "[because the respondent failed to meet the requirements for reopening an *in absentia* order of removal set forth under section 240B(5) [*sic*] of the Act, the Board has no authority to rescind the Petitioner's order of deportation." The Board went on to state, "[t]he Eleventh Circuit has held that the requirements of section 240(b)(5) of the Act are mandatory and jurisdictional. *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999); *see Abdi v. United States Attorney Gen.*, 430 F.3d 1148 (11th Cir. 2005)." (App. 7-10).

Petitioner timely filed a petition for review of the BIA's decision with the Eleventh Circuit. On April 25, 2007, the Eleventh Circuit denied the petition and affirmed the decision of the BIA. The court determined that the BIA did not abuse its discretion as petitioner filed a motion to reopen over 2 years after the BIA issued its decision affirming the IJ's in absentia order. The court found that the 180-day time limitation as set forth by 8 U.S.C. 1229(a)(1); 8 U.S.C. 1229(a)(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii), is "jurisdictional and mandatory" and cannot be equitably

tolled on account of ineffective assistance of counsel. *Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999). The Court failed to consider Petitioner's claims that her *in absentia* order of removal was a direct result of the ineffective assistance rendered by her counsel. The Court found only that the time limitations for motions to reopen are jurisdictional and cannot be equitably tolled on account. (App. 1-5).

REASONS FOR GRANTING THE PETITION

A. The Decision of the Eleventh Circuit Conflicts With The Decisions of Five Other Circuit Courts.

The circuit split warrants review by this court. The conflict among the circuits creates disparate treatment of aliens depending on where they reside. The schism violates the fundamental principle that immigration laws should be applied uniformly across the country.

Pursuant to Section 240(b)(5) of the INA, when an alien fails to appear as directed in a notice of a removal hearing, the alien "shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. 1229(a)(b)(5)(A). Such an order can be rescinded "only" (1) if the alien files a motion to reopen within 180 days of the order's entry and successfully demonstrates that the failure to appear was because of exceptional circumstances or (2) at any time if the alien demonstrates that she did not receive the notice to appear in accordance with 8 U.S.C. 1229(a)(1) and (2). 8 U.S.C. 1229(a)(b)(5)(C); 8 C.F.R. 1003.23(b)(4)(ii). It is well established that the Fifth

Amendment entitles aliens to due process of law in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 307, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993) (*citing The Japanese Immigrant Case*, 189 U.S. 86, 100-101, 47 L. Ed. 721, 23 S. Ct. 611 (1903)). During deportation proceedings aliens have a statutory right to be represented by counsel at their own expense. 8 U.S.C. 1362 (1994). The Circuit Courts are in general agreement that counsel's ineffectiveness can give rise to a due process violation, and have contemplated that the vehicle commonly used to redress claims of ineffective assistance of counsel in deportation proceedings has been an administrative motion to reopen proceedings. *Saakian v. INS*, 252 F.3d 21 (1st Cir. 2001); *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000); *Lu v. Ashcroft*, 259 F.3d 127 (3d Cir. 2001); *Stewart v. INS*, 181 F.3d 587 (4th Cir. 1999); *Goonsuwan v. Ashcroft*, 252 F.3d 383 (5th Cir. 2001); *Store v. INS*, 256 F.3d 498 (7th Cir. 2001); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *Akinwunmi v. INS*, 194 F.3d 1340 (10th Cir. 1999).

The disparity between the circuit courts lies in their varying approaches to the equitable tolling doctrine and whether it should be used to toll filing deadlines for motions to reopen based on ineffective assistance of counsel. Only the Eleventh Circuit has explicitly rejected the argument that equitable tolling applies to filing deadlines for motions to reopen based on ineffective assistance of counsel. *Anin*, 188 F.3d at 1278. The Eleventh Circuit has held that the 180-day time limitation is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Id.* The Ninth, Second, Third, Fourth and Seventh Circuits have held that when a Petitioner does not discover his attorney's malpractice within the 90- or 180-day window,

the deadline will be equitably tolled. *Rodriguez-Lariz*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 879 (2nd Cir. 2000); *Davies v. INS*, 2001 U.S. App. Lexis 22912 (4th Cir. 2001); *Pervaiz v. Gonzales*, No. 04-2958, 2005 WL 949080 (7th Cir. 2005). This allows a Petitioner, with a showing of due diligence after discovering the malpractice, to stop the 90 or 180-day period from running until the Petitioner discovers (or should discover) that the attorney acted fraudulently or ineffectively. Similarly, the Supreme Court has held that

> where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of that statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts ... to conceal it from the knowledge of the other party."

Homberg v. Armbrecht, 327 U.S. 392, 397, 90 L. Ed. 743, 66 S. Ct. 582 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348, 22 L. Ed. 636 (1874); *Federal Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996). "'This equitable doctrine is read into every federal statue of limitation.'" *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (quoting *Homberg*, 327 U.S. at 397; *Federal Election Comm'n*, 104 F.3d at 240).

Failure to review this issue will perpetuate incongruous treatment of aliens based on geography. Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act

of 1986, stating "It is the sense of the Congress that. . . . the immigration laws of the United States should be enforced vigorously and uniformly." 11 Pub. L. No. 99-603, 115, 100 Stat. 3359, 3385 (1986). The Courts of Appeals have often recognized the importance of uniform enforcement of immigration laws. Ironically, the Eleventh Circuit, which is in opposition to five circuits on the issue presented, has stated, "The laws that we administer often affect individuals and the cases we administer in the most fundamental ways. We think that all would agree that to the greatest extent possible *our immigration laws should be applied in a uniform manner nationwide . . .* " *Saramillo v. INS,* 1 F.3d 1149, 1166 (11th Cir. 1993) (emphasis added). The Seventh Circuit similarly stated, "National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in that laws that determine who may cross our national borders and who may become a citizen." *Rosedo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). *See also, e.g., Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996). The split between the Circuit Courts with regard to the nature of the 180-day deadline for filing a motion to reopen removal proceedings is ripe for the Court's consideration. The question presented will not benefit from further consideration in the Circuit Courts.

B. Review Is Also Warranted Because The Decision Below is Clearly Incorrect And Is Contrary to Congressional Intent

Lower Court decisions holding that the 180-day filing deadline is mandatory and jurisdictional are unpersuasive. The Eleventh Circuit in its decision below denied the

petition for review, finding that it has held that the 180-day time limitation in Section 1229(a) is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Anin*, 188 F.3d at 1278-79. The Eleventh Circuit, therefore, did not consider petitioner's claim that her *in absentia* order was a direct result of the ineffective assistance rendered by her counsel. Although *Anin* held that Section 1229(a) has a jurisdictional limit, Supreme Court precedent and statutory interpretation demonstrate that it is better viewed as a tollable statute of limitation. The Supreme Court held that if the time limit is contained in an ordinary statue of limitations it is assumed that it is subject to equitable tolling. *See Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). In *Irwin*, the Court noted that there is a "rebuttable presumption" that equitable tolling applies to federal statutes, and nothing in the INA rebuts this presumption. *Id.* Section 1229(a) contains no specific tolling provision, suggesting that Congress did not want to override the normal pro-tolling presumption, nor does the statute contain detailed or emphatic language. Indeed, it is linguistically similar to numerous other statutes that courts have held to be subject to equitable tolling.

Similarly, the legislative history and statutory purpose evince no congressional intent to limit courts' equitable powers. The history demonstrates a clear concern with prosecutorial fairness and individual equities, and while the statute's purpose includes preventing collusive obstruction, Congress did not intend to limit courts' presumed powers to redress injustice. Given this evidence, the Eleventh Circuit's jurisdictional conclusion seems mistaken.

As courts cannot toll jurisdictional deadlines, a congressional intent to allow tolling would strongly suggest that Congress did not intend to restrict courts' jurisdiction. Congressional intent is, thus, of central concern, and the Court has provided guidance for interpreting it in this context. In *United States v. Locke*, the Court noted that "statutory filing deadlines are generally subject to the defense of . . . equitable tolling," and because Congress is aware of this, there is a "rebuttable presumption" that equitable tolling applies to suits against both private defendants and the United States. *United States v. Locke*, 471 U.S. 84, 94 (1985). A court confronting the issue of whether a filing deadline is tollable must ask the question: "Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350, 136 L. Ed. 2d 818, 117 S. Ct. 849 (1997). Here, as in other situations, the silence of Congress may express a clear legislative intent. *Landsgraf v. USI Film Products*, 511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994) (noting the "traditional presumption" that statues will not be held to have retroactive effect "absent clear congressional intent favoring such a result").

Anin did not explain its jurisdictional reasoning in its determination that the filing deadline is mandatory and jurisdictional, and the court of appeals case, on which it relied, *Kamara v. INS*, provides scant support for its position. *Anin* at 1278-79; *Kamara v. INS*, 149 F.3d 904, 906 (8th Cir. 1988) In *Kamara*, the Eighth Circuit held that the BIA "did not err" in denying as time barred a tardy motion to reopen. *Id.* The court nowhere termed the deadline jurisdictional, nor did it hold that equitable modification was beyond its power. As such, the Eleventh Circuit's jurisdictional holding goes far beyond the Eighth

Circuit's, and neither opinion defends its statutory interpretation in a setting where the Court normally presumes equitable powers.

The Ninth, Second, Third, Fourth and Seventh Circuits have recognized the equitable tolling doctrine where the ineffective assistance of counsel suffered by the petitioner warranted reopening. *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002); *Socop-Gonzales v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999); *Mahmood v. Gonzales*, 427 F.3d 248, 251 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 879 (2d Cir. 2000); *Davies v. INS*, 2001 U.S. App. Lexis 22912 (4th Cir. 2001); *Pervaiz v. Gonzales*, No. 04-2958, 2005 WL 949080 (7th Cir. 2005). The First Circuit has declined to make a finding. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001).

While recognizing the equitable tolling doctrine, the circuit courts have analyzed the text, structure, legislative history, and purpose of Congress' 1990 amendment to the INA in their respective determinations that that the limitations imposed on motions to reopen in deportation proceedings are subject to equitable tolling. *See Lopez v. INS*, 184 F.3d 1097; *Iavorski*, 232 F.3d 879.

The Second and Ninth Circuit Courts have correctly determined that the 1990 Immigration Act and subsequent regulations do not indicate that Congress intended to impose a jurisdictional limit on the filing deadline for a motion to reopen based on ineffective assistance of counsel. *Id.* In fact, the legislative history indicates that while Congress sought to impose general limits on motions to reopen, these limits were not intended to be inflexible. In explaining the limits on motions to reopen, the House

Conference Committee directed that, "the Attorney General . . . shall consider exceptions in the interest of justice." H.R. Conf. Rep. No. 101-995, at 133 (1990).

The First Circuit has recognized that the text, of the statue in question, says nothing explicitly about whether equitable tolling is allowed. *See Jobe v. INS*, 238 F.3d 96 (1st Cir. 2001). In prior cases courts have found that the presence or absence of the words "limitations" or "jurisdiction" to be important, because a statute of limitation is usually subject to equitable tolling, while a jurisdictional provision never is. *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998) (finding persuasive the use of "period of limitations' and limitations period" and absence of word "jurisdiction"); *Shendock v. Director, Office Workers' Comp. Programs*, 893 F.2d 1458, 1462 (2d Cir. 1990) (giving considerable weight to Congress's use of "jurisdiction" in filing provision. Here, the statue contains neither of these terms. Moreover, the potential result of not allowing equitable tolling for filing a motion to reopen based on an *in absentia* order of deportation, would raised due process concerns. The Courts have recognized that non-citizens are entitled to due process. The Courts have determined that when counsel's performance is so ineffective as to have impinged on the fundamental fairness of the hearing it is a violation of the Fifth Amendment due process clause. A jurisdictional filing deadline for a motion to reopen under these circumstances would give no recourse to petitioner whose due process rights are violated.

The INA's 180-day filing deadline for contesting in absentia deportation is best viewed as an equitably tollable statue of limitations, rather than a limit on the courts' jurisdiction. In *Irwin*, this court established that when a time limit is contained in a statue of limitations it is

assumed that it is subject to equitable tolling, absent contrary congressional intent. Nothing in the INA's text, legislative history or purpose indicates that the 180-day filing deadline is jurisdictional, and therefore, the Eleventh Circuit's decision is in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAM S. HANDLER
LAW OFFICES OF SPAR & BERNSTEIN, P.C.
225 Broadway, Suite 512
New York, NY 10007
Telephone: (212) 227-3636

Counsel for Petitioner

July 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14947
Non-Argument Calendar

Agency No. A76-531-649

JACQUELINE FINLAYSON-GREEN,

Petitioner,

versus

U.S. ATTONEY GENERAL,

Respondent.

Petition for Review of a Decision
of the Board of Immigration Appeals

(April 25, 2007)

Before TJOFLAT, HULL and WILSON, Circuit Judges.

PER CURIAM:

Jacqueline Finlayson-Green, a native and citizen of Jamaica, appeals the Board of Immigration Appeal's ("BIA") denial of her motion to reconsider its denial of her motion to reopen. In this case, the Immigration Judge ("IJ") ordered Finlayson-Green removed *in absentia*.

Background

Finlayson-Green was ordered removed *in absentia*, after her counsel advised her not to attend a removal hearing for which Finlayson-Green had received a notice to appear. Finlayson-Green's counsel had filed a motion to change venue, which was denied, and a motion for reconsideration of the denial, which was denied at the hearing. At the removal hearing, the IJ found that Finlayson-Green had received notice of the hearing and had been properly served before ordering her removed *in absentia*.

Finlayson-Green appealed the order to the BIA, arguing the IJ had improperly denied her motion for a change of venue or telephonic appearance. The BIA affirmed without opinion. In October 2005, Finlayson-Green filed a motion to reopen with the BIA through new counsel. In the motion, Finlayson-Green alleged that her previous counsel rendered ineffective assistance of counsel, which resulted in Finlayson-Green's failure to attend the removal hearing, and the failure to properly appeal the *in absentia* removal order to this Court. The BIA denied the motion as untimely and also denied Finlayson-Green's subsequent motion to reconsider.

Standard of Review

We review the denial of a motion to reopen for abuse of discretion, and we are limited to "determining whether there has been an exercise of administrative discretion and whether the matter of exercise has been arbitrary or capricious." *Ali v. U.S. Att'y Gen.*, 443 F.3d 804, 808 (11th Cir. 2006) (per curiam) (citation and quotation marks omitted). Motions to reconsider are also reviewed for abuse of discretion. *Assa'ad v. U.S. Att'y Gen.*, 332 F.3d 1321,

1341 (11th Cir. 2003). Motions to reconsider and reopen are disfavored, especially in a removal proceeding, "where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS v. Doherty*, 502 U.S. 314, 323, 112 S. Ct. 719, 724-25, 116 L. Ed. 2d 823 (1992) (discussing motions to reopen).

Discussion

Finlayson-Green argues that the BIA wrongfully concluded that the untimeliness of her motion to reopen deprived it of jurisdiction over the motion and her subsequent motion to reconsider. Finlayson-Green also argues that the BIA should have applied equitable tolling or reopened her case *sua sponte*.

The BIA did not abuse its discretion by failing to apply equitable tolling to Finlayson-Green's petition to reopen. When an alien fails to appear as directed in a notice of a removal hearing, the alien "shall be ordered removed in absentia" if the government "establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable." 8 U.S.C. § 1229a(b)(5)(A). Such an order can be rescinded "only" (1) if the alien files a motion to reopen within 180 days of the order's entry and successfully demonstrates that the failure to appear was because of exceptional circumstances, or (2) at any time if the alien demonstrates that she did not receive the notice to appear in accordance with 8 U.S.C. § 1229(a)(1) and (2). 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii).

Finlayson-Green does not contend that she did not receive notice to appear; instead she admits that she did receive it, but contends that she failed to appear due to the ineffective assistance of her counsel. Finlayson then filed her motion to reopen over 2 years after the BIA issued its decision affirming the IJ's *in absentia* removal order. We have held that the 180-day time limitation is "jurisdictional and mandatory" and cannot be equitably tolled on account of ineffective assistance of counsel. *Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999) (per curiam). Therefore, the BIA did not abuse its discretion in denying the motion to reopen based on untimeliness.

While we have jurisdiction to review the BIA's decision not to exercise its *sua sponte* authority to reopen or reconsider, we hold that the BIA did not abuse its discretion. Decisions not to reopen under § 1003.2(a) are reviewed for an abuse of discretion. *See Anin*, 188 F.3d at 1279. While the BIA may *sua sponte* grant a motion to reopen at any time pursuant to 8 C.F.R. § 1003.2(a), the BIA has wide discretion to deny such a motion, even if the moving party has met its *prima facie* burden to reopen. 8 C.F.R. § 1003.2(a). Under § 1003.2(a), the BIA has the discretion to reopen the proceedings "as it sees fit." *Anin*, 188 F.3d at 1279 (discussing 8 C.F.R. § 3.2(a) a prior version of § 1003.2(a)). Given the untimeliness of Finlayson-Green's motions, we can find no abuse of discretion here.

Upon review of the administrative record and the parties' briefs, we discern no error in the BIA's decisions. The BIA committed no errors of law or fact by denying her motion to rescind and, thus, also did not abuse its

discretion in denying the motion to reconsider. Accordingly, we deny the petition for review.

PETITION DENIED.

Charles H. Kuck
Kuck, Casablanca LLC
8010 ROSWELL RD STE 300
ATLANTA GA 30350-7014

April 25, 2007

Appeal Number: 06-14947-GG
Case Style: Jacqueline Finlayson-Green v. U.S. Atty. Gen.
Agency Number: A76-531-649 ()

CC: Charles H. Kuck

CC: David V. Bernal

CC: Michelle G. Latour

CC: Anthony C. Nicastro

CC: P. Michael Truman

CC: Administrative File

[LOGO] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

FINLAYSON-GREEN
JACQUELINE
14634 NORTH 64TH
AVENUE
GLENDALE, AZ
85014-0000

Office of the Chief Counsel/
MIA
333 South Miami Ave.,
Suite 200
Miami, FL 33130

Name: FINLAYSON-GREEN JACQUELINE

A76-531-649

Date of this notice:
08/15/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 531 649 – Miami Date: Aug. 15, 2006

In re: JACQUELINE FINLAYSON-GREEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Pro se

APPLICATION: Motion to reconsider

An Immigration Judge on December 14, 1999, found the respondent removable under section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. §1227(a)(1)(B), and ordered her deported to Jamaica in absentia. The respondent, through counsel, filed an appeal to the Board of Immigration Appeals. On April 16, 2003, the Board summarily affirmed the Immigration Judge's decision. The respondent filed an appeal with the Eleventh Circuit Court of Appeals, which was dismissed on September 18, 2003. Her attorney was suspended by the Arizona bar on April 23, 2005. She filed an untimely motion to reopen with the Board on October 28, 2005. The Board denied the motion on April 10, 2006, because it was untimely and failed to meet the requirements for an exception to the denial of an untimely motion to reopen an in absentia proceeding. On May 9, 2006, she filed a motion to reconsider. The motion will be denied.

The respondent married a United States citizen on March 11, 1997, and he filed a visa petition on her behalf, along with her application for adjustment of status. The Notice to Appear was issued on October 8, 1999, after she and her husband did not appear for their interview.[1] On August 25, 1999, the respondent's husband withdrew the petition with a statement that the marriage was a sham and that she had paid him to marry her to gain immigration benefits. The Immigration and Naturalization Service denied her adjustment of status on September 3, 1999. She was divorced from her husband on October 28, 1999. The respondent married another United States citizen on May 6, 2000. His visa petition on her behalf was approved on May 10, 2006. They have two United States citizen children. She contends the Board erred in denying her motion to reopen because she was the victim of ineffective assistance of counsel. She wishes the proceedings to be reopened and remanded so she can apply for adjustment of status.

The respondent is a 42-year-old native and citizen of Jamaica who entered the United States on or about December 31, 1996, as a visitor and remained longer than permitted. She asserts that she divorced her first husband because he was a drug addict and that the marriage had been bona fide. She moved from Florida to Arizona after her divorce and she found an attorney there whom she hired to help her. She states that the motion to reopen in absentia proceedings should be granted because she was the victim of ineffective assistance of counsel. Because the

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[1] The respondent contends that they did appear for the interview, but it was not held because her husband had not brought any identification.

respondent failed to meet the requirements for reopening an in absentia order of removal set forth under section 240B(5) of the Act, the Board as has no authority to rescind the respondent's order of deportation.

A motion to reconsider is used to allege errors in appraising the facts and the law and must be supported by precedent decisions. 8 C.F.R. § 1003.2(b)(1). *See Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd*, *Cerna v. INS*, 979 F.2d 212 (11th Cir. 1992); *Matter of Tiwari*, 20 I&N Dec. 254 (BIA 1991). An order of removal following proceedings conducted in absentia pursuant to section 240(b)(5) of the Act, 8 U.S.C. § 1229a(b)(5), may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal which demonstrates that the alien failed to appear because of exceptional circumstances, or upon a motion filed at any time if he did not receive proper notice of the hearing, or he was in Federal or State custody and failed to appear through no fault of his own. *See* 8 C.F.R. § 1003.23(b)(4)(iii). The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien, such as serious illness of the alien or death of an immediate relative, but not including less compelling circumstances. Section 240(e)(1) of the Act, 8 U.S.C. § 1229a(e)(1).

The Eleventh Circuit has held that the requirements of section 240(b)(5) of the Act are mandatory and jurisdictional. *Anin v. Reno*, 188 F.3d 1273 (11th Cir. 1999); *see Abdi v. United States Attorney General*, 430 F.3d 1148 (11th Cir. 2005). Moreover, the respondent does not claim she was unaware of the hearing in Miami, and she would not have been eligible for any relief from removal, even if she had attended the hearing. The respondent does not meet the statutory requirements for recision of the in

absentia order. Therefore, the Board did not err in denying the motion to reopen.

Accordingly, the motion will be denied.

ORDER: The motion to reconsider is denied.

/s/ Roger Pauley
FOR THE BOARD

[LOGO] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

RACHEL EFFRON
3350 PEACHTREE RD., SUITE 1600
ATLANTA, GA 30326-0000

Office of the Chief Counsel/ MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: FINLAYSON-GREEN JACQUELINE

A76-531-649

Date of this notice: 04/10/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ F.F. Krider
Frank Krider
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76 531 649 – Miami Date: Apr. 10, 2006

In re: JACQUELINE FINLAYSON-GREEN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Rachel Effron, Esquire

ORDER:

PER CURIAM. On April 16, 2003, we dismissed the respondent's appeal, after an Immigration Judge ordered the respondent removed *in absentia*. More than 2 years later, on October 28, 2005, the respondent filed a late motion to reopen. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not responded to the pending motion, which will be denied.

The Eleventh Circuit Court of Appeals has considered a deadline for filing a motion seeking to reopen an *in absentia* deportation order to be "jurisdictional and mandatory." *Anin v. Reno*, 188 F.3d 1273, 1278 (11th Cir. 1999); *see also Abdi v. U.S. Attorney General*, 430 F.3d 1148 (11th Cir. 2005).

In any event, we note that the respondent claims that she received ineffective assistance from an attorney, Dorothea Kraeger, who has been suspended from practice

before the Board. However, the respondent fails to adequately explain why she waited so long to file the pending motion. The motion states that after Kraeger was suspended, the attorney "turned over the respondent's case", to another attorney, Michael Franquina. The motion, and the respondent's affidavit, fail to state when this took place, or why Franquina could not have assisted the respondent in filing an earlier motion. The pending motion is, therefore, denied.

/s/ Frederick D. Hess
FOR THE BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12528-AA

JACQUELINE FINLAYSON-GREEN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondents.

On petition for Review of a Final Order of the
Board of Immigration Appeals

ENTRY OF DISMISSAL

(Filed Sep. 8, 2003)

Pursuant to 11th Cir.R. 42-2(c), this appeal is hereby dismissed for want of prosecution because the petitioner has failed to file an appellant's brief and record excerpts within the time fixed by the rules, effective this 8th day of September, 2003.

THOMAS K. KAHN
Clerk of the United States Court
of Appeals for the Eleventh Circuit

By: /s/ Shirley M. Brown/emd
Deputy Clerk

FOR THE COURT –
BY DIRECTION

[SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Kraeger, Dorothea P., Esquire
3707 North 7th Street
Suite 250
Phoenix, AZ 85014-0000

Office of the
District Counsel/MI
155 So. Miami Ave.,
Rm. 500
Miami, FL 33130

Name: FINLAYSON-GREEN, JACQUELINE

A76-531-649

Date of this notice: 04/16/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
COLE, PATRICIA A.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A76-531-649- MIAMI Date: APR 16 2003

In re: FINLAYSON-GREEN, JACQUELINE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kraeger, Dorothea P., Esquire

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ Patricia A. Cole
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
MIAMI, FLORIDA

IN THE MATTER OF:

/s/ Finlayson, Jacqueline) **Case No. A** 76-531-649
RESPONDENT)
RESPONDENT IN)
REMOVAL PROCEEDINGS)

On behalf of Respondent: **On behalf of Service**

/s/ Dorothea Kraeger **,Esq.** /s/ Chantel Dookes
No appearance in court **Assistant District Counsel**
[ ] PRO SE

WRITTEN DECISION OF THE IMMIGRATION JUDGE

Jurisdiction was established in this matter by the issuance of a Notice to Appear upon the Respondent. *See* Section 239 of the Immigration and Nationality Act, Exhibit No.1.

Notice that this removal proceeding was to be conducted on this date was given to the parties on October 19, 1999. *See* Exhibit No.1.1. The Respondent had a reasonable opportunity to be present but did not appear. No exceptional circumstances have been advanced why the Respondent was absent. This hearing was, therefore, conducted *in absentia* pursuant to Section 240 of the Immigration and Nationality Act. *See Matter of Marallaq*, 13 I&N Dec. 775 (BIA 1971); *Ibrahim v. INS*, 821 F.2d 1547 (11th. Cir. 1987)

[x] At a previous hearing the Respondent admitted the allegations of fact in the Notice to Appear and Conceded removability. I find removability is

established in accordance with the law. Removability conceded in motion to change venue.

[ ] At the hearing the Assistant District Counsel submitted evidence relating to the allegations in the Notice to Appear. See *Matter of Mejia*, 16 I&N 6 (BIA 1976). I find Respondent removable as charged. Section 240(b)(5)(A).

Any pending applications for relief from removal are considered abandoned. *See Matter of Balibundi*, 19 I&N Dec. 606 (BIA 1988). *Matter of Pearson,* 13 I&N Dec. 152 (BIA 1969). Cf. *Matter of Jean*, 17 I&N Dec. 100 (BIA 1979).

ORDER: The Respondent shall be removed to Jamaica on the charge(s) contained in the Notice to Appear.

Dated this 14th day of December, 1999.

/s/ Mahlon F. Hanson
MAHLON F. HANSON
U.S. Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL ( ) PERSONAL (X) [MFH]

TO:
( ) ALIEN ( ) ALIEN c/o Custodial Officer
( ) ALIEN'S ATT./REP. (X) INS [MFH]

DATE: _____ COURT STAFF BY: _____
ATTACHMENT(S) ( ) EOIR-33 ( ) EOIR-28 ( )
LEGAL SERVICES LIST ( ) OTHERS___

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
155 South Miami Avenue, 9th Floor
Miami, Florida 33130

IN THE MATTER OF:

FINLAYSON, JACQUELINE *CASE NO. A-76-531-649*

[X] *RESPONDENT* *DECISION ON A MOTION*
[ ] *APPLICANT*

IN: [ ] *DEPORTATION* [ ] *EXCLUSION*

[X] *REMOVAL PROCEEDINGS* [ ] *PRO SE*

ALIEN ATTORNEY: DOROTHEA P. KRAEGER

DISTRICT COUNSEL:

A motion TO RECONSIDER DENIAL OF CHANGE OF VENUE REQUEST has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

[ ] The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be *GRANTED*.

[X] The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant that it be granted. Therefore, IT IS HEREBY ORDERED that the Motion be and the same is hereby *DENIED*.

[X] The factual allegations have not been admitted. No telephonic master calendar hearing will be allowed.

cc: District Counsel
Counsel for
Respondent/Applicant
Respondent/Applicant

/s/ Mahlon F. Hanson
MAHLON F. HANSON
U.S. Immigration Judge

Date Signed: Dec. 14, 1997

Certificate of Service

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN'S ATTY/REP [X] INS

DATE: 12-14-99 BY COURT STAFF: [Illegible]
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
155 South Miami Avenue, 9th Floor
Miami, Florida 33130

IN THE MATTER OF:

FINLAYSON, JACQUELINE *CASE NO. A-76-531-649*

[X] *RESPONDENT* *DECISION ON A MOTION*
[ ] *APPLICANT*

IN: [X] *DEPORTATION* [ ] *EXCLUSION*

[X] *REMOVAL PROCEEDINGS* [ ] *PRO SE*

ALIEN ATTORNEY: *DOROTHEA P. KRAEGER*

DISTRICT COUNSEL:

A motion FOR CHANGE OF VENUE has been filed in the above captioned case. The Motion has been duly considered and it appears to the Court that:

[ ] The request is timely and reasonable. Therefore, IT IS HEREBY ORDERED that the Motion be *GRANTED*.

[X] The Motion has been duly considered and it appears to the Court that no substantial grounds have been advanced to warrant that it be granted. Therefore, IT IS HEREBY ORDERED that the Motion be and the same is hereby *DENIED*.

[X] No change of venue will be granted until **all** issues of removability are resolved. Respondent and her counsel are required to attend the scheduled hearing in Miami on December 14, 1999 at 9:00 a.m.

cc: District Counsel
Counsel for
Respondent/Applicant
Respondent/Applicant

/s/ Mahlon F. Hanson
MAHLON F. HANSON
U.S. Immigration Judge

Date Signed: November 29, 1999

Certificate of Service

THIS DOCUMENT WAS SERVED BY:
MAIL (M) PERSONAL (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN'S ATTY/REP [X] INS

DATE: 12-01-99 BY COURT STAFF: [Illegible]
Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

No. 07-101

In the Supreme Court of the United States

JACQUELINE FINLAYSON-GREEN,
PETITIONER

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
JENNIFER PAISNER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that the Board of Immigration Appeals did not abuse its discretion in denying petitioner's motion to reconsider its denial of petitioner's untimely motion to reopen her removal proceedings based on allegations of ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 07-101

JACQUELINE FINLAY SON-GREEN,
PETITIONER

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 228 Fed. Appx. 919. The decisions of the Board of Immigration Appeals (BIA or Board) (Pet. App. 6-10, 11-13) and the immigration judge (IJ) (Pet. App. 17-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2007. The petition for a writ of certiorari was filed on July 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that removal proceedings brought under 8 U.S.C. 1229a (2000 & Supp. V 2005) are initiated by a written Notice to Appear served in person on the alien, or, if personal service is not practical, "through service by mail to the alien or to the alien's counsel of record." 8 U.S.C. 1229(a)(1). The Notice to Appear must identify, among other things, the nature of the proceedings, the conduct alleged to be unlawful, and the charges against the alien. 8 U.S.C. 1229(a)(1)(A), (C) and (D).

b. Section 1229a sets forth procedures for the conduct of removal proceedings. In situations where an alien fails to appear, Section 1229a(b)(5)(A) provides that the alien "shall be ordered removed in absentia if the [Immigration and Naturalization] Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable" as charged. 8 U.S.C. 1229a(b)(5)(A).[1]

Section 1229a(b)(5)(C) sets forth limited circumstances in which a removal order that was entered *in absentia* may be rescinded. "Such an order," it declares,

> may be rescinded only—
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> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because

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[1] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

> of exceptional circumstances (as defined in subsection (e)(1) of this section),[2] or
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> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. 1229a(b)(5)(C). In addition, federal regulations provide that an IJ "may upon his or her own motion at any time * * * reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals," 8 C.F.R. 1003.23(b)(1), and that the BIA "may at any time reopen or reconsider on its own motion any case in which it has rendered a decision," 8 C.F.R. 1003.2(a).[3]

2. Petitioner is a native and citizen of Jamaica who overstayed a nonimmigrant visa. In 1997, she married an American citizen, who filed an immigrant relative visa petition on her behalf. In August 1999, petitioner's husband withdrew the petition, asserting that the mar-

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[2] The statute defines "exceptional circumstances" as "refer[ring] to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." 8 U.S.C. 1229a(e)(1) (Supp. V 2005).

[3] A separate regulation provides the general "time and numerical limitations [on motions to reopen] set forth in [8 C.F.R. 1003.23(b)(1)] shall not apply to a motion to reopen agreed upon by all parties and jointly filed." 8 C.F.R. 1003.23(b)(4)(iv). Motions to reopen *in absentia* removal orders, however, are addressed in a different portion of the regulations, 8 C.F.R. 1003.23(b)(4)(iii).

riage was a sham and that petitioner had paid him to marry her. Pet. App. 8.

3. a. On October 8, 1999, the Immigration and Naturalization Service (INS) issued a Notice to Appear alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(B), and was subject to removal as a result. Admin. R. 186-188 (A.R.). The Notice of Removal ordered petitioner to appear before an IJ in Miami, Florida on December 14, 1999. A.R. 186.

On November 26, 1999, attorney Dorothea Kraeger entered an appearance on behalf of petitioner and made a one-sentence request to have "this matter transferred because [petitioner] as well as counsel reside in the State of Arizona." A.R. 180. In that document, petitioner admitted to having remained in the United States longer than permitted by her visa, but denied that she had paid her former husband to assist her in obtaining lawful residence and stated that she would be "requesting relief in the form of adjustment of status." A.R. 180; see A.R. 186, 188.

On November 29, 1999, the IJ denied petitioner's transfer motion, stating that no venue change would be granted "until *all* issues of removability are resolved" and ordering petitioner to report in person in Miami on December 14, 1999. Pet. App. 21-22.

On December 10, 1999—four days before petitioner's removal hearing—attorney Kraeger filed a motion asking the IJ to reconsider the denial of petitioner's request for a change of venue. A.R. 176-178. In those moving papers, petitioner asserted that she had divorced her former husband and moved to Arizona, and that she could not afford to travel to Miami for her immigration hearing. A.R. 176-177. Petitioner stated that she "has admitted and conceded" the allegations in the Notice to

Appear, and that she intended to request relief from removal at the hearing. A.R. 177. "In the alternative," petitioner stated that she "would be available at the office of her counsel for a 9[a.m.] hearing, telephonically to discuss the issues regarding her removability and renewed Motion to Change Venue." *Ibid.*

Petitioner did not appear at her removal hearing on December 14, 1999. Pet. App. 17. At the hearing, the IJ denied petitioner's motion to reconsider the denial of petitioner's earlier motion for a change of venue, stating that "[t]he factual allegations have not been admitted" and that a telephonic appearance would not be permitted. *Id.* at 19. Concluding that petitioner's change of venue motion had conceded facts sufficient to establish removability, however, the IJ entered an *in absentia* order directing that petitioner be removed to Jamaica. *Id.* at 17-18.

b. Petitioner appealed the IJ's *in absentia* removal order to the BIA, claiming that the IJ had "erred as a matter of law" in failing to transfer her case from Florida to Arizona. A.R. 133; see A.R. 152-153. On April 16, 2003, the BIA affirmed the IJ's removal order without opinion. Pet. App. 16. Petitioner sought review by the Eleventh Circuit, but that petition was dismissed on September 8, 2003, after petitioner failed to file a timely brief. *Id.* at 14.

c. On October 28, 2005—nearly five years after the IJ's *in absentia* removal order, two-and-a-half years after the BIA affirmed that order, and more than two years after the Eleventh Circuit dismissed her petition for review of the Board's decision—petitioner filed a motion to reopen her removal proceedings with the BIA. A.R. 46, 48-57. In that motion, petitioner, now represented by new counsel, claimed that Kraeger had pro-

vided ineffective assistance of counsel and that this constituted an "exceptional circumstance[]" sufficient to warrant reopening petitioner's removal proceedings. A.R. 48, 53-56. Petitioner also stated that she had married a United States citizen in May 2000 with whom she had two children, and that her husband had filed a relative visa petition on her behalf and that she had filed a new application for adjustment of status. A.R. 52. Petitioner's motion to reopen her removal proceedings did not address petitioner's failure to seek reopening within the 180-day period specified in 8 U.S.C. 1229a(b)(5)(C)(i), or assert that the period was subject to equitable tolling.

The BIA denied petitioner's motion to reopen her removal proceedings. Pet. App. 12-13. Citing the Eleventh Circuit's decisions in *Anin* v. *Reno*, 188 F.3d 1273 (1999), and *Abdi* v. *United States Attorney General*, 430 F.3d 1148 (2005), the Board stated that the 180-day "deadline for filing a motion seeking to reopen an *in absentia* deportation order [is] 'jurisdictional and mandatory.'" Pet. App. 12 (quoting *Anin*, 188 F.3d at 1278). "In any event," the BIA continued, petitioner had "fail[ed] to adequately explain why she waited so long to file the pending motion." *Id.* at 12-13. Although petitioner's filing stated that her former attorney Kraeger had "turned over [petitioner's] case" to another named attorney after Kraeger was suspended from practice, *id.* at 13 (quoting A.R. 52), those documents "fail[ed] to state" exactly when that had occurred "or why [that new attorney] could not have assisted [petitioner] in filing an earlier motion." *Id.* at 12-13. Petitioner did not file a petition for review with the court of appeals from that decision.

c. On May 9, 2006, petitioner filed a motion asking the Board to reconsider its denial of her untimely motion to reopen her removal proceedings. A.R. 14-19. In that motion and accompanying affidavits, petitioner asserted that she "had no idea" that the Eleventh Circuit had dismissed her appeal "until July 2005." A.R. 15-16, 23. According to petitioner, Kraeger had repeatedly told her that "our case was 'ok' or 'fine'" as late as the early months of 2005, but that on April 23, 2005, she had received an email message from Kraeger's assistant informing her that Kraeger had been suspended from the practice of law and that petitioner's appeal papers were still in her file. A.R. 23. Petitioner asserted that she had met with a new attorney on May 16, 2005, but that she and that attorney had been unable to meet with Kraeger to obtain petitioner's file until July 12, 2005, because Kraeger skipped an earlier meeting. A.R. 23-24. On August 1, 2005, petitioner retained a third attorney, because her second one did not practice in Florida. A.R. 24-25. Petitioner also argued in her motion to reconsider that the 180-day filing deadline for filing motions to reopen *in absentia* removal orders should have been equitably tolled based on attorney Kraeger's ineffective handling of petitioner's case. A.R. 17-18.

On May 12, 2006, petitioner supplemented her motion to reconsider by filing with the BIA a notice that she had received from the Department of Justice stating that her husband's relative visa petition had been approved, and asserting that she would be eligible for adjustment of status if her case were reopened. A.R. 4, 8.

On August 15, 2006, the BIA denied petitioner's motion to reconsider its denial of her motion to reopen her removal proceedings. Pet. App. 6-10. The purpose of a motion to reconsider, the Board stated, is "to allege er-

rors in appraising the facts and the law." *Id.* at 9. The Board reiterated its previous statements that the statutory 180-day time limit on motions to reopen based on exceptional circumstances is "mandatory and jurisdictional." *Ibid.* It also noted that petitioner "does not claim [that] she was unaware of the hearing in Miami" and stated "she would not have been eligible for any relief from removal, even if she had attended the hearing." *Ibid.* As a result, the Board concluded that petitioner "does not meet the statutory requirements for recision of the in absentia order." *Id.* at 9-10.

4. A unanimous panel of the Eleventh Circuit denied a petition for review in an unpublished per curiam opinion. Pet. App. 1-5. Citing its earlier decision in *Anin*, the court of appeals concluded that the 180-day period set forth in 8 U.S.C. 1229a(b)(5)(C)(i) "cannot be equitably tolled on account of ineffective[ness] * * * of counsel." Pet. App. 4. Accordingly, the court of appeals held that "the BIA did not abuse its discretion in denying the motion to reopen based on untimeliness." *Ibid.*[4]

ARGUMENT

Petitioner contends (Pet. 10-18) that the Eleventh Circuit's refusal to require the BIA to apply equitable tolling in the circumstances of this case was both erroneous and conflicts with the decisions of other courts of appeals. Further review is not warranted, because the Eleventh Circuit's unpublished decision is correct, no other court of appeals would hold that the BIA abused its discretion in refusing to invoke equitable tolling on

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[4] The court of appeals also concluded that the Board had not abused its discretion in declining to exercise its authority to reopen petitioner's removal proceeding *sua sponte*. Pet. App. 4 (citing 8 C.F.R. 1003.2(a)). That issue is not before this Court. See Pet. i.

these facts, and petitioner would be unable to obtain relief even if equitable tolling were sometimes available. The Court recently denied certiorari in another case from the Eleventh Circuit raising the same issue, *Kennedy* v. *Keisler*, cert. denied, No. 06-1603 (Oct. 9, 2007), and there is no reason for a different disposition here.

1. The BIA did not abuse its discretion in denying petitioner's motion to reconsider its earlier denial of petitioner's untimely motion to reopen her removal proceedings. Whether a given statutory time limitation is subject to equitable tolling is ultimately a matter of statutory construction. See, *e.g.*, *United States* v. *Brockamp*, 519 U.S. 347, 349-354 (1997). In addition, this Court's decisions confirm that the BIA's reasonable constructions of the immigration statutes that it administers are entitled to *Chevron* deference, including in situations where those interpretations are announced in the course of adjudicating individual cases. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

In two decisions issued in 1998, the BIA concluded that the 180-day deadline for motions to reopen proceedings based on "exceptional circumstances" contained in former 8 U.S.C 1252b(c)(3)(A) (1994)—a provision whose language was in all material respects identical to the one at issue in this case[5]—contained no "exception" for situations

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[5] Former Section 1252b(c)(3) provided that an order of deportation entered in absentia could be rescinded

> only—
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> (A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

"where the failure to timely file a motion to reopen is due to ineffective assistance of counsel." *In re Lei*, 22 I. & N. Dec. 113, 115-116; see *In re A-A-*, 22 I. & N. Dec. 140, 143. The statutory language, the Board stressed, clearly stated that deportation orders could be rescinded "*only*" in the specifically enumerated circumstances, and contained "no exceptions to [the 180-day] time bar." *In re Lei*, 22 I. & N. Dec. at 116; *In re A-A-*, 22 I. & N. Dec. at 143. The BIA also explained that its interpretation was "consistent with the overall statutory scheme," because the broader provision of which the relevant language was a part had been "enacted to provide stricter and more comprehensive deportation procedures, particularly for in absentia hearings, to ensure that proceedings are brought to a conclusion with meaningful consequences." *In re Lei*, 22 I. & N. Dec. at 116; *In re A-A-*, 22 I. & N. Dec. at 144.

The BIA's conclusion that allegations of ineffective assistance of counsel are insufficient to prevent the running of the 180-day time period for filing motions to reopen based on exceptional circumstances is entirely reasonable and thus entitled to deference by the courts. Section 1229a(b)(5)(C) states that an *in absentia* re-

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> (B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

8 U.S.C. 1252b(c)(3) (1994). This provision was repealed by Section 308(b)(6) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-615, and redesignated as amended as 8 U.S.C. 1229a(b)(5)(C) by IIRIRA Section 304(a)(3), 110 Stat. 3009-589. See pp. 2-3, *supra* (quoting current Section 1229a(b)(5)(C)).

moval order may be rescinded "only" in three specified circumstances—where the alien's failure to attend the removal hearing was due to "exceptional circumstances," where the alien "did not receive notice in accordance with [8 U.S.C. 1229(a)(1) or (2)]," or where imprisonment prevented the alien from attending the hearing. 8 U.S.C. 1229a(b)(5)(C)(i) and (ii). Of the enumerated grounds, only one—the provision under which petitioner seeks relief—contains a time limitation. That "explicit listing" of provisions as to which time limits do and do not apply demonstrates "that Congress did not intend [the agency or] courts to read other unmentioned, open-ended 'equitable' exceptions into the statute that it wrote." *Brockcamp*, 519 U.S. at 352.

In addition, "[t]he nature of the underlying subject matter" (*Brockcamp*, 519 U.S. at 352) reinforces the conclusion that Congress did not intend to permit equitable tolling based on claims of ineffective assistance of counsel. As this Court has explained, motions to reopen removal proceedings are "especially" disfavored because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). In addition, permitting aliens to avoid the 180-day time bar by claiming ineffective assistance of counsel would "waste the time and efforts of immigration judges called upon to preside at [the] hearings" that would presumably be necessary whenever an alien could make a "prima facie" ineffectiveness claim. *INS* v. *Abudu*, 485 U.S. 94, 108 (1988) (citation omitted).

2. Petitioner nonetheless asserts that this Court should grant review because of what she claims is a circuit split about whether equitable tolling is available in situations where an alien claims that her failure to com-

ply with the 180-day time limitation was due to the "ineffectiveness" of the alien's privately retained attorney.[6] Petitioner is mistaken; in fact, it is entirely likely that no court of appeals would have held that the BIA

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[6] Although it is not the ground upon which she seeks a writ of certiorari, petitioner errs in suggesting that "counsel's ineffectiveness can give rise to a due process violation," Pet. 11; see Pet. 17. An alien in removal proceedings has a statutory right to be represented by counsel of the alien's choice at no expense to the government. 8 U.S.C. 1229a(b)(4)(A). This Court has never held, however, that the Constitution requires the government to appoint counsel for aliens in removal proceedings. And in *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas corpus case, the Court held that, when the Constitution does not require the government to provide counsel, the ineffectiveness of privately retained counsel does not violate the Constitution. *Id.* at 754; see *Wainwright* v. *Torna*, 455 U.S. 586 (1982) (per curiam) (no basis for constitutional claim of ineffective assistance of counsel in seeking discretionary state supreme court review of criminal conviction, because there is no constitutional right to counsel in that setting).

There is no obvious reason why the result should be different in the removal context. As Judge Easterbrook has explained:

> The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant * * * is entitled to due process, but it has long been understood that lawyers' mistakes in civil litigation are imputed to their clients and do not justify upsetting the outcome. The civil remedy is damages for malpractice, not a re-run of the original litigation.

Magala v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir. 2005) (citations omitted). Indeed, this Court has repeatedly held in other contexts that a party is bound by counsel's errors in civil proceedings. See *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993); *United States* v. *Boyle*, 469 U.S. 241, 249-250 (1985); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). Thus, although petitioner is correct that a number of courts have held that an alien has a constitutionally based claim of ineffective assistance of counsel in removal proceedings, this Court's decisions do not support that proposition.

abused its discretion in declining to apply equitable tolling on the facts presented here.

a. Three circuits have assumed without deciding that equitable tolling is sometimes available under 8 U.S.C. 1229a(b)(5)(C)(i). See *Jobe* v. *INS*, 238 F.3d 96, 100 (1st Cir. 2001) (en banc) (Pet. 16); *Scorteanu* v. *INS*, 339 F.3d 407, 413 (6th Cir. 2003); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005).

b. Although petitioner is correct (Pet. 11-12) that the Third and Ninth Circuits have concluded that equitable tolling is sometimes available under Section 1229a(b)(5)(C)(i), both courts have carefully limited their holdings to situations in which the alien's failure to file a timely and otherwise proper motion was the result of fraud. In *Borges* v. *Gonzales*, 402 F.3d 398 (3d Cir. 2005), an alien alleged that his failure to attend his removal hearing had been due to ineffective assistance of counsel, and that his failure to file a timely motion to reopen his removal proceedings on that basis had been due to a paralegal's false statement that such a document had, in fact, been filed. See *id.* at 402. Taking care to note that the alien's argument was *not* "that ineffective assistance of counsel can or should constitute an 'exception' to the 180-day time limit," *id.* at 405, the Third Circuit held that the period may be equitably tolled where an alien has been the victim of "fraud," which it defined as a situation in which the alien actually and reasonably relied on "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party." *Id.* at 407 (brackets in original; citation omitted).[7]

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[7] Petitioner does not cite *Borges*, referencing instead the Third Circuit's decision in *Mahmood* v. *Gonzales*, 427 F.3d 248, 251 (2005) (Pet.

The Ninth Circuit's decisions are similar. In *Lopez* v. *INS*, 184 F.3d 1097 (1999) (Pet. 12), that court held that the 180-day limitations period contained in the predecessor statute that the BIA construed in *In re Lei* and *In re A-A-*, see pp. 9-10 & note 5, *supra*, was subject to equitable tolling "where the alien's late petition [to reopen was] the result of the deceptive actions by a notary posing as an attorney." *Lopez*, 184 F.3d at 1100; see *id.* at 1098 ("We conclude that the statutory time limit for reopening is tolled by the *fraudulent* representations made by Lopez's former 'counsel.'") (emphasis added). In *Varela* v. *INS*, 204 F.3d 1237 (2000) (Pet. 12), the Ninth Circuit extended *Lopez*'s reasoning to "[a] federal regulation [that] places time and numerical limitations on motions to reopen deportation proceedings" in situations where an alien attended the initial removal hearing. *Id.* at 1239 (citing 8 C.F.R. 3.2(c)(2) (2000)). Once again, however, the Ninth Circuit stressed that equitable tolling was available because the alien had been "*defrauded* by an individual purporting to provide legal representation." *Id.* at 1240 (emphasis added). *Rodriguez-Lariz* v. *INS*, 282 F.3d 1218 (9th Cir. 2002) (Pet. 12), construed the same regulation that had been at issue in *Varela*. 282 F.3d at 1223-1224. There, the Ninth Circuit concluded that equitable tolling was avail-

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12, 16). In *Mahmood*, the court of appeals read *Borges* as holding that the statutory deadlines set forth in Section 1229a "are subject to tolling in at least some circumstances" and assumed that ineffective assistance of counsel could sometimes warrant such tolling. See *id.* at 251-252. Because the court found that the alien's lack of due diligence would preclude equitable tolling in that case, however, it did "not attempt to define generally what qualifies as ineffectiveness sufficient to justify tolling." *Id.* at 252 n.8.

able because a non-lawyer to whom the aliens had given money to coordinate their removal proceedings had "missed the deadline for filing the application for suspension of deportation[,] * * * *lied* [to the aliens] about having done so," and later "compounded his mistakes and misrepresentations by advising the filing of a motion for reconsideration that prejudiced [the alien's] claims." *Id.* at 1224-1225 (emphasis added).[8]

Here, the petition for a writ of certiorari neither alleges fraud, nor asserts facts that could establish the kind of fraudulent conduct that might be sufficient to warrant equitable tolling under *Borges*, *Lopez*, *Varela*, and *Rodriguez-Lariz*. Petitioner repeatedly describes the issue presented as whether the 180-day deadline may be tolled for "ineffective assistance of counsel." Pet. 1.[9] Nor does the petition for a writ of certiorari allege anything that could fairly be characterized as "fraud" by petitioner's former counsel. Although petitioner alleges that Kraeger's ineffectiveness "resulted in her failure to attend the removal hearing" (Pet. 8), petitioner has never disputed that she received notice of that hearing and of the IJ's denial of her initial motion

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[8] *Socop-Gonzalez* v. *INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (Pet. 11-12, 16), did not involve equitable tolling based on ineffective assistance of counsel. In that case, the court of appeals held that equitable tolling was available under the same regulation construed in *Varela* in a situation where an alien had relied on incorrect advice provided by an INS official. See *id.* at 1181, 1193-1194.

[9] See Pet. 8 (maintaining that "Ms. Kraeger's ineffective assistance as counsel resulted in [petitioner's] failure to attend the removal hearing, and her failure to properly appeal the *in absentia* removal order to the Eleventh Circuit"); Pet. 11 ("Only the Eleventh Circuit has explicitly rejected the argument that equitable tolling applies to filing deadlines for motions to reopen based on ineffective assistance of counsel.").

for a change of venue. Moreover, even assuming that Kraeger advised petitioner not to attend her removal hearing—a fact never directly alleged in the petition—such a tactical decision on Kraeger's part, while certainly ill-advised, falls far short of the sort of affirmative "false representations of a material fact made with knowledge of [its] falsity and with intent to deceive the other party" (*Borges*, 402 F.3d at 407 (quoting *Valansi* v. *Ashcroft*, 278 F.3d 203, 209 (3d Cir. 2002))) that would be necessary to support a finding of fraud. Accordingly, neither Third Circuit nor Ninth Circuit precedent would support the conclusion that the BIA abused its discretion in failing to apply equitable tolling on the facts alleged in the petition for a writ of certiorari.

c. Petitioner is correct that the Second and Seventh Circuits have stated that ineffective assistance of counsel may, at least in certain circumstances, justify equitable tolling of various statutory or regulatory limitations on motions to reopen removal proceedings. One of the decisions she cites, however, does not even involve the statutory 180-day deadline for moving to reopen *in absentia* removal orders. Both of the decisions, moreover, predate this Court's recent clarification that "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in [a] context where [litigants] have no constitutional right to counsel." *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007). As explained above (see note 6, *supra*), an alien has no constitutional right to have counsel furnished by the government in removal proceedings, and therefore, under *Coleman* v. *Thompson*, 501 U.S. 722 (1991), has no constitutionally based claim of ineffective assistance of counsel. Accordingly, to the extent that either of the decisions of the Second and Seventh Circuits suggests

that another court of appeals may have granted relief on the facts presented here, such a holding cannot survive *Lawrence*.

In any case, it is highly unlikely that petitioner would have been able to obtain relief in any other circuit even before *Lawrence*. The relevant holding of *Iavorski* v. *INS*, 232 F.3d 124 (2d Cir. 2000) (Pet. 12), was that ineffective assistance of immigration counsel may sometimes warrant tolling a 90-day limitations period set forth in a 1996 Department of Justice regulation that is not at issue in this case. See *id.* at 129-130.[10] In so holding, the Second Circuit relied on the text of the underlying statute directing the Department of Justice to place limitations on the number and time for filing motions to reopen and reconsider, "the Department of Justice's own interpretation of its rule making mandate from Congress, and the BIA's view of the rules that were promulgated." *Id.* at 130. In addition, moreover, the *Iavorski* court held that equitable tolling was unavailable as a matter of law in that case because the alien had failed to exercise "due diligence" during the period that he sought to have tolled. *Id.* at 134. The Seventh Circuit has likewise held that equitable tolling is unavailable absent a showing of due diligence by the alien. See *Pervaiz* v. *Gonzales*, 405 F.3d 488, 490-491 (7th Cir. 2005) (Pet. 12).[11]

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[10] The regulation was the same one at issue in the Ninth Circuit's decision in *Varela*. See *Iavorski*, 232 F.3d at 131.

[11] Petitioner also cites the Fourth Circuit's unpublished decision in *Davies* v. *INS*, 10 Fed. Appx. 223 (2001) (Pet. 12). Like *Iavorski* and *Pervaiz*, *Davies* predates this Court's decision in *Lawrence*. In addition, the Fourth Circuit's three-paragraph per curiam opinion states only that "[u]nder the unusual facts and exceptional circumstances presented in this case"—facts and circumstances that are described no-

As the Board found in this case (Pet. App. 12-13), petitioner would not be eligible for equitable tolling even if allegations of ineffective assistance of counsel were sometimes sufficient to authorize it. In her petition for a writ of certiorari, petitioner nowhere alleges that she exercised sufficient "due diligence in preserving [her] legal rights" to justify resort to the "sparingly" invoked doctrine of equitable tolling. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Nor do the facts in the administrative record establish due diligence on her part. Petitioner did not file her motion to reopen her removal proceedings until October 28, 2005, nearly five years after the IJ's *in absentia* removal order, more than two years after the BIA summarily affirmed that order, and more than two years after the Eleventh Circuit dismissed her petition for review based on her failure to file a brief. Pet. App. 12, 14-18. In her initial motion to reopen her removal proceedings, petitioner failed to state when Kraeger had been suspended from practice or why her second attorney "could not have assisted [her] in filing an earlier motion." *Id.* at 13a. And although petitioner's motion for reconsideration asserted that she did not discover that Kraeger had been suspended until April 2005 and did not learn of Kraeger's misconduct in her case until July 2005, A.R. 16, 22-23, the function of a motion to reconsider is to "specify the errors of law or fact in the previous order," 8 U.S.C. 1229a(c)(6)(C) (Supp. V 2005); see Pet. App. 9, not to allege facts and make arguments than an alien neglected to raise sooner. In any event, even petitioner's belated

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where in the opinion other than a statement that counsel "had been ineffective in numerous respects"—the court had concluded that the BIA abused its discretion in denying the aliens' petition to reopen their removal proceedings. See *id.* at 224.

explanation did not account for the fact that her October 28, 2005, motion to reopen her removal proceeding was filed more than 180 days after she learned that Kraeger had been suspended from practice. Even if a court were to conclude that it was reasonable for petitioner to take no affirmative action to protect her interests before that time, receipt of the April 23, 2005, email message would have put any reasonable person on notice that there may be a problem. Accordingly, even a properly presented claim of equitable tolling in this case would have failed as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2007